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In the Supreme Court
OF THE
United States

OCTOBER TERM 1948

No. 659

KANAME FUJINO,

Petitioner,

vs.

TOM C. CLARK, Attorney General of the
United States,

Respondent.

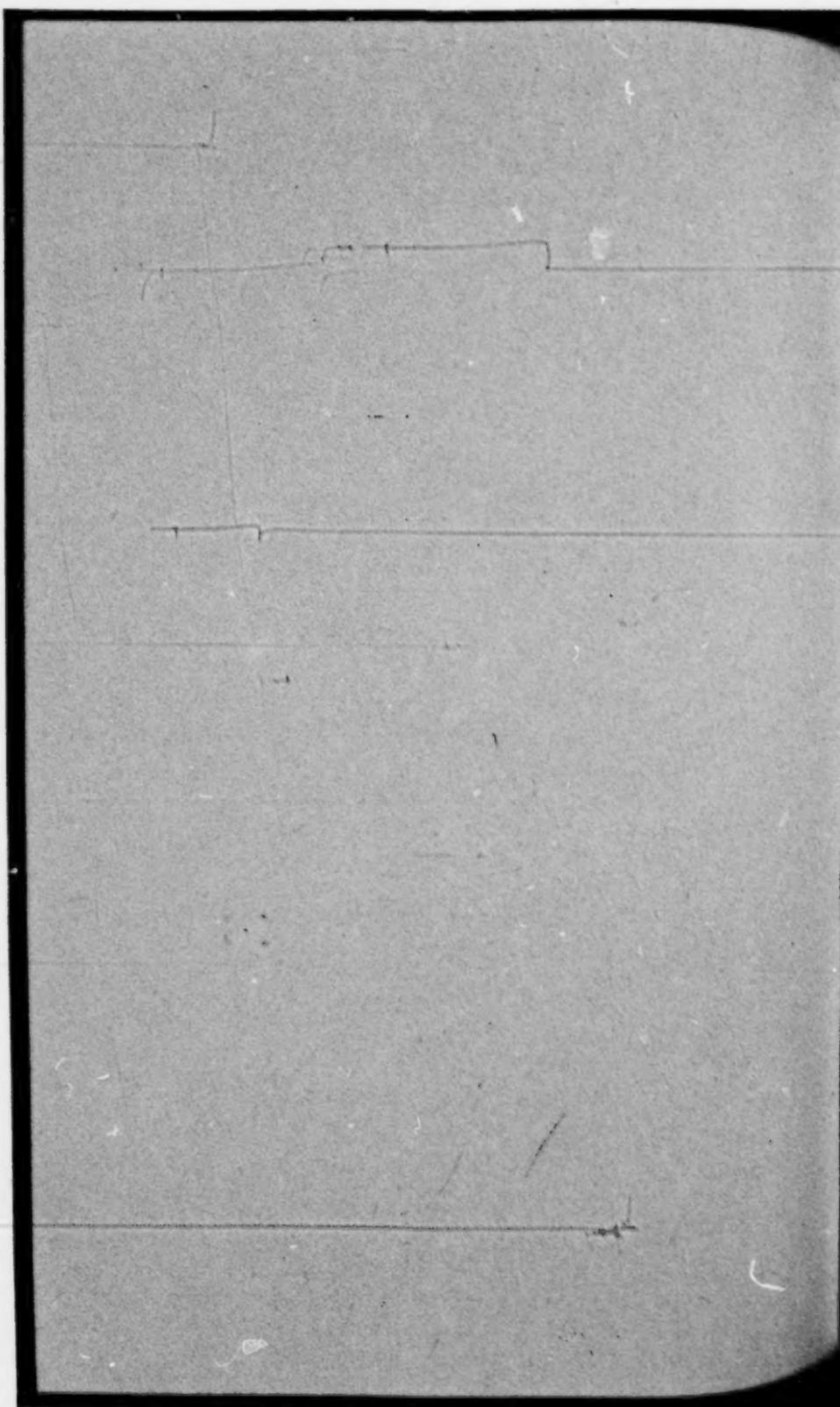
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the
Ninth Circuit.

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*To the Honorable Fred M. Vinson, Chief Justice of
the United States and to the Honorable Associate
Justices of the Supreme Court of the United
States:*

Kaname Fujino prays that a writ of certiorari issue to review the decree (R. 542) of the United States Court of Appeals for the Ninth Circuit en-

tered January 31, 1949, affirming the judgment of the United States District Court for the Territory of Hawaii entered June 5, 1947 (R. 60).

SUMMARY STATEMENT OF MATTER INVOLVED.

This case involves the right of petitioner, a native born, loyal American citizen, to recover his property that was seized by the Alien Property Custodian¹ under the Trading With the Enemy Act.² Petitioner, a resident of Hawaii, acquired the real estate by deed of gift from his alien father, a resident of Japan, on March 21, 1941 (R. 30). The deed was duly executed, delivered and recorded and was in fulfillment of the wishes of the father expressed in 1939 and 1940 (R. 83, 418-421). The deed was executed by the grantor's attorneys in fact acting under a power of attorney likewise duly recorded (R. 479) authorizing them to convey the real estate. After the deed had been delivered, the father in April, 1941, was advised that his instructions had been carried out (R. 420).

On December 3, 1943, the Alien Property Custodian made an administrative determination that petitioner was controlled by his alien father, declared him to be a national of Japan and accordingly vested the

¹The term "Alien Property Custodian" herein includes that officer (Executive Order No. 9095, 7 Fed. Reg. (1942) 971) or his successor, the Attorney General (Executive Order No. 9788, 11 Fed. Reg. (1946) 11981) as the context may require.

²40 Stat. 411, 50 U.S.C. App. 1, et seq.; hereafter referred to as the "Act".

property (R. 13-17). Petitioner filed suit to recover his property in the District Court pursuant to Section 9(a) of the Act. The Alien Property Custodian answered, interposing three defenses:

- (1) That the power of attorney under which petitioner's father's deed was executed was void (R. 20).
- (2) That petitioner and his father effected the transaction "in a conspiracy and with the purpose and intent * * * to defraud the United States" (R. 30).
- (3) That petitioner "acted directly and indirectly for the benefit or on behalf of Yotaro Fujino * * * and plaintiff (petitioner) is therefore a national of a foreign country * * * and as such has no standing to institute or maintain this action" (R. 31).

At the trial all of the evidence was produced by petitioner. There was no evidence of sham, or that the father had any legal or equitable interest in the property. The District Court made no finding that the transaction was a sham or a fraud.

The Court of Appeals in a short opinion rejected the erroneous ruling of the District Court that petitioner's deed "is a nullity" because of lack of authority of the attorneys in fact and held that petitioner had the record title (R. 538, 540).³ It made no specific reference to any of the detailed findings

³If the opinion of the Court of Appeals can be construed to mean that the power of attorney (R. 479) was insufficient to authorize the conveyance, nevertheless the attorneys in fact had full authority under unrecorded instructions to execute the deed (R. 265-268, 418-421), *Arnold v. Reed*, 162 Mass. 438, 440 (1894).

of the District Court, but dismissed the case in the following terse paragraph:

The District Court found that although the record title stood in appellant's name the beneficial ownership of the property was retained by Yotaro and that in holding the record title appellant acted for and on behalf of Yotaro and was controlled by him. Thus in effect the record title was found to be a sham. The findings are supported by substantial evidence, are not clearly erroneous and hence are accepted by us as correct. (R. 540.)

The words "thus in effect" in the paragraph just quoted disclose the vice in the decree below. The District Court, as we have said, made no finding of fraud, conspiracy or sham. The attempt by the Court of Appeals to construe other findings of the District Court (without specific reference to them) as a conclusion that the transaction was a sham or fraud, requires a review by this Court to correct the misinterpretation by the Court below of the findings of the District Court.

If the property of a citizen is to be appropriated under the Act upon the ground that he has attempted a fraud against his government, it is not too much to ask that the trier of the facts at least make an unequivocal determination of the existence of the fraud. It is not enough for an Appellate Court to say that the District Court "in effect" found the transaction to be a sham. The District Court made no such finding and

indeed if it had the finding would not be supported by evidence.

The District Court found that petitioner was "a national of a foreign country within the meaning of Section 5(b) of the Trading With The Enemy Act and Executive Orders 8389 and 9095". (R. 59.) In reaching this conclusion the District Court did so upon an erroneous construction of the statute which placed the burden of proof upon petitioner to prove that he was not a national of a foreign country.*

The finding of the District Court that petitioner in Honolulu was controlled by his alien father in Japan was based upon acts done by petitioner in Hawaii, assisting his sisters in Honolulu who were in need of funds (R. 182, 213), in making a wedding present of \$500 to an American citizen, a son of his father's friend (R. 226) and finally in paying his father's income tax to the Collector of Internal Revenue (R. 275-7).

The acts relied on by the District Court as the basis of its finding that petitioner was under the control of his nonresident father were simple acts of filial decency and were wholly insufficient to afford the basis of such a conclusion.

Even if the parent-child relationship be held to constitute "control" within the meaning of Section 5(b) and the regulations issued thereunder, it is immaterial to the question whether petitioner sustained the burden

*Cf. *Oyama v. California*, 332 U.S. 633, 644 (1947).

of showing that he was not an "enemy or ally of an enemy" under Section 9(a) of the Act.

The District Court erred in ruling that petitioner, a loyal American citizen, had the burden of proof of showing that he was not a national of Japan as that term is used in Section 5(b) of the Act. Section 9(a) does not place such a burden on a citizen as a condition precedent to the recovery of his property. If this is the proper construction of the Act, it is unconstitutional as authorizing confiscation of private property and a denial of due process of law under the Fifth Amendment.

OPINIONS BELOW.

The opinion of the District Court (R. 49-60) is reported in 71 F. Supp. 1. The opinion of the Court of Appeals is not yet reported, but appears in the record, (R. 537-541).

JURISDICTION.

The decree of the Court of Appeals sought to be reviewed was entered January 31, 1949 (R. 542). The jurisdiction of this Court is invoked under Public Law 773, 80th Congress, 2d Session, c. 646, Sections 1254 and 2101; Title 28, United States Code, Sections 1254 and 2101.

QUESTIONS PRESENTED.

The questions here may be summarized as follows:

- (1) Did the Court of Appeals misconstrue the findings of the District Court in reaching its conclusion that the transaction in question was "in effect" a sham?
- (2) Can the property of a citizen of the United States which he received by deed of gift from his alien father on March 21, 1941, be appropriated by the Alien Property Custodian where there was no agreement, express or implied, between the donor and donee that the latter would hold the property for the former?
- (3) Should Section 9(a) of the Trading With The Enemy Act be construed to require a citizen of the United States to prove anything more than his "interest, right or title" and the fact that he is not "an enemy or an ally of an enemy" in order to recover property seized by the Alien Property Custodian under Section 5(b)?
- (4) Does the action of the Alien Property Custodian in this case appropriating petitioner's property under the Trading With The Enemy Act as construed by the District Court amount to a denial of due process of law under the Fifth Amendment?

STATUTES INVOLVED.

The pertinent portions of the statutes involved and the Executive Orders are set forth in the Appendix.

**REASONS RELIED ON FOR ALLOWANCE
OF THE WRIT.**

This case involves a fundamental question under the Trading With The Enemy Act, namely, whether the property of a loyal American citizen can be confiscated by administrative action designating him as a national of a foreign country and whether upon the bringing of suit which Congress has authorized, his claim will be dismissed as though he were an enemy or ally of an enemy.

Although this case was fully briefed and argued below, the Court of Appeals⁵ in a short opinion neither discussed the findings of the District Court (fifteen in number) nor the questions of law presented, but disposed of the case in a single sentence: "Thus in effect the record title was found to be a sham" (R. 540), a finding not made by the District Court and having no basis in the record.

The Court of Appeals, like the District Court, drew no distinction between Section 7(c) and Section 5(b) of the Act and failed to give effect to the changes wrought by the amendment. It failed to recognize that the purpose of the amendment was to reach

⁵The case was argued September 13, 1949, and decided January 31, 1949. Supplemental briefs were requested by the court and filed (R. 535).

transactions previously without the reach of the vesting power. The purpose of the amendment was to bring within the reach of the vesting power assets which were enemy controlled though ostensibly friendly or neutral. It was not the purpose of the amendment to appropriate assets belonging to an admittedly loyal American citizen or a friendly neutral. *Clark v. Uebersee Finanz-Korp.*⁶

While it is conceded that under Section 5(b) the Alien Property Custodian might peremptorily seize the property of an American citizen if he suspects the assets are beneficially owned or are controlled by an enemy, however, when the citizen brings suit and establishes his "interest, right or title" and the fact that he is "not an enemy or an ally of an enemy" then under the command of Section 9(a) the erroneous seizure must be corrected and the property returned. The statute does not permit the confiscation of a citizen's property as was done in this case with the sanction of the Court of Appeals.

When the District Court decided this case, it did not have the benefit of the opinion of this Court in *Clark v. Uebersee Finanz-Korp.*, (supra) and understandably failed to integrate Section 2, Section 5(b), Section 7(c) and Section 9(a).

Section 2(a) defines the word "enemy" as—

Such other individuals * * * or subjects of any nation with which the United States is at war, other than citizens of the United States * * *

⁶332 U.S. 480, 485 (1947).

Section 7(c) authorizes the seizure in time of war of property supposed to belong to the enemy.

Section 5(b) adds the element of "control" by a national of a designated enemy country.

Section 9(a) permits the owner of property seized under Section 7(c) or 5(b) to sue for return of the property erroneously seized.⁷

Since the petitioner had "an interest, right or title" to the property under the deed from his father and was "not an enemy or ally of an enemy" he can recover by suit under the express provisions of Section 9(a) of the Act.

Under the construction of the Act adopted by the District Court the petitioner in this case was not only obliged to prove his American citizenship and to prove his title but to go beyond this and establish proof to the satisfaction of the court that he was not controlled by his father.

To sustain the decree below it is necessary to construe "enemy" to include a citizen of the United States in face of an express declaration by Congress to the contrary in Section 2 of the Act defining the term "enemy". We contend that if this is the proper construction of the Act it is unconstitutional as a denial of due process of law.

Assuming that an American citizen must not only prove his citizenship and his title, but also must estab-

⁷*Central Trust Co. v. Garvan*, 245 U.S. 554, 556 (1921).

lish by a preponderance of the evidence that he was not controlled by an enemy, we contend that under the uncontradicted evidence that burden has been surmounted and that there is no substantial evidence to support a finding that petitioner was controlled by his father.

This case is important for it is the first (to our knowledge) that has come here involving the question whether a native born, loyal American citizen can be administratively found to be a national of an enemy country and his right to recover his property proscribed as though he were an enemy or an ally of an enemy. If this is the proper construction of the Act in face of the plain language of Section 2, defining "enemy or ally of an enemy" as certain persons "other than citizens" and of Section 9(a) allowing suit and recovery it should be so declared by this Court.

Wherefore, petitioner prays:

That a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that court to certify to and send to this Court for its review and determination a full and complete transcript of the record and proceedings of said court had in the case numbered and entitled in its docket as "No. 11786, Kaname Fujino, Appellant, v. Tom C. Clark, Attorney General of the United

States, Appellee" and that the decree of said court be reversed by this Court.

Dated, Honolulu, Hawaii,
March 11, 1949.

KANAME FUJINO, *Petitioner.*
By J. GARNER ANTHONY,
Counsel for Petitioner.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

(Appendix Follows.)

Appendix

Statutory Provisions

Trading With The Enemy Act. c. 106, 40 Stat. 411,
as amended (50 U.S.C. App. 1-31):

The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

* * * * *

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy".

The words, "ally of enemy", as used herein, shall be deemed to mean—

* * * * *

(c) Such other individuals, or body, or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy".

Sec. 5 (as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 859, 50 U.S.C. App., Supp. V, 5(b)):

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or ear-marking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the

President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

Sec. 7 (as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020):

* * * * *

(e) If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy * * * which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

Sec. 9 (as amended):

(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the

Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled:

Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its prin-

cipal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

Executive Order No. 9095 (as amended):

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(e) any other property within the United States owned or controlled by a designated enemy country or national thereof, not including in such other property, however, cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof:

10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines:

(i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or

(ii) that such person is a citizen or subject of a des-

ignated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading With The Enemy Act, as amended.

Executive Order No. 8389 (as amended):

* * * * *

Section 5.

* * * * *

E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly,

such foreign country and/or one or more nationals thereof as herein defined,

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

In any case in which by virtue of the foregoing definition a person is a national of more than one foreign country, such person shall be deemed to be a national of each such foreign country. In any case in which the combined interests of two or more foreign countries designated in this Order and/or nationals thereof are sufficient in the aggregate to constitute, within the meaning of the foregoing control or 25 per centum or more of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of a partnership, association, corporation or other organization, but such control or a substantial part of such stock, shares, bonds, debentures, notes, drafts, or other securities or obligations is not held by any one such foreign country and/or national thereof, such partnership, association, corporation or other organization shall be deemed to be a national of each of such foreign countries. The Secretary of the Treasury shall have full power to determine that any person is or shall be deemed to be a "national" within the meaning of this definition, and the foreign country of which such person is or shall be deemed to be a

national. Without limitation of the foregoing, the term "national" shall also include any other person who is determined by the Secretary of the Treasury to be, or to have been, since such effective date, acting or purporting to act directly or indirectly for the benefit or under the direction of a foreign country designated in this Order or national thereof, as herein defined.